

EXHIBIT D

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

3
4 BRIAN HUNTER, : Docket No. CV07-1307 (RJL)

: July 24, 2007

5 Plaintiff, :

: 4:15 p.m.

6 :

v. :

7 :

FEDERAL ENERGY REGULATORY :

8 COMMISSION, :

:

9 Defendant. :

.....:

10

11

12 TRANSCRIPT OF TEMPORARY RESTRAINING ORDER
13 BEFORE THE HONORABLE RICHARD J. LEON
14 UNITED STATES DISTRICT JUDGE

13

14

APPEARANCES:

15

16 For the Plaintiff: MICHAEL KIM, ESQ.

JUSTIN VAUN SHUR, ESQ.

17

Kobe & Kim, LLP

1050 Connecticut Avenue, N.W.

18

Washington, D.C. 20036

19

For the Defendant: MEGAN ROSE

20

U.S. Attorney's Office

555 4th Street, N.W.

21

Washington, D.C. 20530

22

JUSTIN M. SHELLAWAY, ESQ.

Federal Energy Regulatory

23

Commission

24

888 First Street, N.E.

25

Washington, D.C. 20426

1

2

3

4

5

6 Court Reporter: PATTY ARTRIP GELS, RMR

7 Official Court Reporter

8 Room 4800-C, U.S. Courthouse

9 Washington, D.C. 20001

10 (202) 962-0200

11

12

13

14 Proceedings reported by machine shorthand, transcript produced

15 by computer-aided transcription

1 PROCEEDINGS

2 COURTROOM DEPUTY: Your Honor, this is the matter of
3 Brian Hunter versus Federal Energy Regulatory Commission, Civil
4 Action 07-1307. This matter is scheduled for a TRO.

5 Parties, come forward and state your appearances for
6 the record.

7 MR. KIM: Good afternoon, your Honor. Michael Kim and
8 Justin Shur for Plaintiff Brian Hunter.

9 THE COURT: Welcome.

10 MS. ROSE: Good afternoon, your Honor. Assistant
11 United States Attorney Megan Rose representing FERC. Also
12 seated with me at counsel table is Ms. Leanne Watson and -- I am
13 sorry -- Justin Shellaway from FERC as well.

14 THE COURT: Thank you, Ms. Rose.

15 Mr. Kim, as far as yours, what you want is
16 extraordinary, so I will give you a little time here to explain
17 why it is it's appropriate for this Court to do it and how you
18 qualify for the -- meeting the requirements of the TRO.

19 MR. KIM: Yes, your Honor. Your Honor, as a threshold
20 matter, I am not admitted to the bar of this court, and I
21 believe my colleague, Justin Shur, who is, has made a Motion to
22 admit me pro hac vice. So before I address your Honor, I wanted
23 to request that your Honor grant that Motion.

24 THE COURT: That's fine. I will grant that Motion.

25 MR. KIM: Thank you, your Honor. Your Honor, I believe

1 the relief we request is certainly unusual, but has a basis in
2 the case law because what we are requesting, your Honor, is
3 essentially the following. We are requesting that your Honor
4 issue a Temporary Restraining Order to prevent a Federal agency
5 from doing something that is completely outside the scope of its
6 statutory authority. In other words, we are not --

7 THE COURT: How do you know they are going to do it?

8 MR. KIM: Because they --

9 THE COURT: You don't have a crystal ball.

10 MR. KIM: Your Honor, they have informed us that they
11 will do it. We do have correspondence from them, as well as
12 they have informed us that they will issue this order, and once
13 the order is issued, that is the very harm we are trying to
14 prevent. So it is not a matter of speculation or our theory
15 that we will issue it; they have told us explicitly they will
16 issue it and also named the date on which they will issue it,
17 although the exact date is ambiguous. And they have also given
18 us attachments of documents that they intend to use in
19 connection with this action.

20 So it is not a speculative or threatened action. It is
21 imminent.

22 THE COURT: Um-hum.

23 MR. KIM: In addition, your Honor, we are not, for
24 purposes of this argument, requesting relief under the
25 Administrative Procedure Act. I want to be absolutely clear

1 about that. For purposes of this application, your Honor, we
2 are relying on the Court's inherent equitable jurisdiction,
3 which has been recognized on a number of cases, to enjoin a
4 Government agency that is acting outside the statutory authority
5 granted to it by Congress.

6 So in other words, we are not here complaining to your
7 Honor that there is a matter within the FERC's jurisdiction but
8 that we are unhappy with the manner in which the FERC is
9 carrying out its responsibilities. I won't concede that. We
10 might complain about that to your Honor at some point, but for
11 purposes of this application, the issue that we are bringing
12 before your Honor is that the FERC is doing something that is
13 clearly outside the statutory authority granted to it by
14 Congress, which is a pure issue of law that is within the unique
15 province of the Article III court to resolve; in other words,
16 the issue of Congressional intent and the issue of whether the
17 statute unambiguously excludes FERC from having jurisdiction in
18 this are.

19 THE COURT: Why is it outside of their domain of
20 authority?

21 MR. KIM: Your Honor, there are a number of sources
22 cited in our brief, and I do have to tell your Honor that we
23 received the FERC's letter on Friday. It is dated the 19th, but
24 it was received by us on Friday. I believe it was also sent on
25 Friday.

1 And we have done the best we can in the one business
2 day we have had to bring before your Honor everything that we
3 are aware of now -- I believe there are probably more out
4 there -- as to why natural gas futures is an area that is
5 clearly outside the province of jurisdiction of the FERC, and
6 not just outside their jurisdiction, but in the exclusive
7 jurisdiction of the CFTC. We have cited in our brief various
8 sources, and basically the sources fall within the categories of
9 either explicit language in all the relevant statutes, both
10 enabling the CFTC as well as statutes that go to the FERC
11 itself -- in fact, the very statute, the Energy Policy Act of
12 2005, which the FERC purports to move under for this enforcement
13 action explicitly recognized the CFTC's exclusive jurisdiction.

14 I believe the second category of materials that we were
15 able to find in the short term -- and, you know, I believe that
16 there's probably more out there, and we have previously brought
17 these materials to the FERC's attention, although obviously the
18 focus so far has been my trying to convince the FERC that their
19 theory is incorrect -- but another source of materials, your
20 Honor, are the FERC's own pronouncements, both in the materials
21 that been released in the Federal Register as well as statements
22 they have made as well as agreements they have entered into
23 where they explicitly recognized that futures, natural gas
24 futures, are in the exclusive province of the CFTC.

25 And obviously the only rational meaning of the word

3 THE COURT: Did you talk to the CFTC about this?

6 THE COURT: No, but did you bring it to their attention
7 that FERC was grabbing their authority away from them? Did you
8 run it by them?

10 THE COURT: What did they say?

17 But, your Honor, my belief -- or my information is that
18 the CFTC believes that the FERC is wrong in asserting
19 jurisdiction in this area. And I believe it is possible that
20 the CFTC itself might come either before your Honor or another
21 Court.

Page 7

1 although, obviously, as your Honor points out, before then I was
2 in the realm of maybe they will bring the action, maybe they
3 won't, and it was not yet ripe.

4 THE COURT: So let's say they do what they have said in
5 some letter that they are going to do.

6 MR. KIM: Yes, your Honor.

7 THE COURT: The decision to execute that letter is
8 either within the scope of their authority or not within the
9 scope of their authority, and it can be evaluated in a
10 Preliminary Injunction hearing at a later time. Where is the
11 extraordinary irreparable harm that's going to befall your
12 client between the date they issue the letter and the date of
13 any future ruling that the -- that they didn't have authority to
14 issue such an order?

15 MR. KIM: Yes, your Honor. I believe the reason in
16 this case that the irreparable harm is the issuance of the order
17 itself is because we are talking about a Plaintiff who has a
18 fairly large investment in a company that is a regulated
19 company, Solengo Capital ULC, which is a hedge fund, or I should
20 say an investment company that has just started. And Mr. Brian
21 Hunter's declaration to your Honor sets forth a number of
22 grounds on which the mere issuance of the order that they
23 contemplate will cause Solengo to lose the ability to gain
24 various types of regulatory approvals as well as lose all of its
25 indications of interest from investors as well as the unique

1 group of professionals it has gathered.

2 So this is not a case, for example, your Honor, where I
3 represent a Plaintiff who is vaguely complaining that if the
4 FERC engages in an enforcement action and he loses, somehow he
5 will be harmed. I believe in that type of case your Honor very
6 well might say perhaps I have jurisdiction over this; I will
7 appear at a Preliminary Injunction hearing, say, several weeks
8 from now, and until then, everybody just does whatever they were
9 going to do. I think here, your Honor, the very issuance of the
10 order itself is the harm and will destroy my client's business.

11 And I believe your Honor recently held in another
12 case -- I believe it's Capital Paving of D.C. --

13 THE COURT: How do you know that, though?

14 MR. KIM: I saw it published, your Honor, in Westlaw,
15 and your Honor's name was attached to it.

16 THE COURT: No, no, no. How do you know it's going to
17 ruin the business?

18 MR. KIM: Your Honor, I believe that --

19 THE COURT: How do you know that? I mean, that's
20 speculative at best.

21 MR. KIM: Your Honor, the part that is not speculative
22 is that, as Mr. Hunter's declaration explains, there are various
23 types of permits that they are supposed to get, and the issuance
24 of the order itself, he has been advised by various
25 professionals, will essentially devastate the ability of Solengo

1 to qualify for various permits as well as potentially have
2 people flee.

3 THE COURT: Until such time as that order is held
4 illegal. You know, if you are right that this would be an
5 illegal order --

6 MR. KIM: Yes, your Honor.

7 THE COURT: -- on the part of the agency, and this
8 Court were to agree with you, ultimately, from the point of a
9 ruling that it was an illegal order, then your client would be
10 able to get whatever permits he was otherwise qualified to get,
11 you know, prior to than, and then I guess we would have a
12 hearing as to any damages that your client was entitled to
13 during that period between the filing of the order and the
14 Court's ruling that the order was illegal. Right?

15 MR. KIM: I have a few different ideas to offer to your
16 Honor for that. First of all, if the business were to collapse
17 now and had to be restarted at some point in the future, all the
18 investors who have indicated an interest in investing -- and
19 when it formally launches, it would accept investments from
20 these investors -- would obviously invest elsewhere. That is
21 just the nature of money.

22 Now, as to whether Solengo would be able to win those
23 investors back is unclear, but what Mr. Hunter's declaration
24 explains is that there are indications of investment interest
25 and have been collected so far. That's not the exact quote from

1 his affidavit, but that's essentially one concept.

2 I believe, second, your Honor -- and I think that's
3 similar to a concept of if you have a business -- and I believe
4 your Honor recently held in this case that threatening the very
5 existence of a business equals irreparable harm. If you have a
6 business, and that business itself collapses, substantially
7 collapses or ceases to exist, it's always true, for example,
8 that somebody could go and start another business in the future.
9 But the point is the harm to this business that he started where
10 he has invested a substantial amount of money and time to gather
11 various professionals that, once recruited, there were
12 recruiting costs, et cetera -- if they leave, it's unclear
13 whether he will be able to bring those people back together
14 again, and that is really at the essence of the value of this
15 business.

16 And, your Honor, I believe the third point is that in
17 order for the Court to conclude that Mr. Hunter is not
18 irreparably injured because Mr. Hunter could just claim for
19 damages for the damages in the interim -- I believe there are
20 two assumptions in that statement that may not be true. I
21 believe, first of all, there is the assumption that Mr. Hunter
22 could recover money from the FERC, which itself is a highly
23 complex question because of the fact that they are a Government
24 agency and this is not another private party who is coming in
25 and interfering with his business. And so he may never be able

1 to recover money, even if such money could be calculated.

2 And, second, your Honor, where you are talking about a
3 start-up business, there is immense difficulty in quantifying,
4 in terms of dollar amounts, the amount of money that is being
5 lost although, clearly, there is harm in terms of him losing his
6 new business.

7 So where the amount of damages is hard to quantify, I
8 believe it is proper for the Court to issue equitable relief, to
9 hold things still so that if it turns out that Mr. Hunter is
10 wrong and your Honor rules and the Courts rule that the FERC can
11 proceed, if he loses his business, that's just a consequence of
12 life.

13 If it turns out that Mr. Hunter is right, however, your
14 Honor, if we are in a situation where his new business is gone,
15 it is difficult if not impossible for him to prove damages and
16 difficult if not impossible for him to get anyone to pay -- that
17 is irreparable harm.

18 THE COURT: A TRO lasts in ten days. What's going to
19 happen in ten days?

20 MR. KIM: Your Honor -- hopefully, your Honor will
21 entertain a Preliminary Injunction and we will be able to do
22 that and we will be able to proceed to a judgment on the merits.

23 THE COURT: Yes, but you are not going to get a ruling
24 on that within ten days.

25 MR. KIM: Well, your Honor --

1 THE COURT: What's going to happen between the issuance
2 of a TRO and the lapsing of the TRO? What's going to happen in
3 ten days?

4 MR. KIM: Your Honor, hopefully before the TRO lapses
5 and the FERC feels free to issue this order, we would have
6 secured equitable relief from the Court to prevent the FERC from
7 issuing the order pending resolution of these issues.

8 THE COURT: That's not how it works.

9 MR. KIM: Your Honor, but --

10 THE COURT: You are not going to get it. You are going
11 to get a PI hearing, if you are lucky, within two weeks.

12 MR. KIM: Well --

13 THE COURT: You are not going to -- you know, the TRO
14 will have lapsed before you are going to get a ruling on the PI.

15 MR. KIM: Well, perhaps, your Honor, the only practical
16 thing to do is to schedule the PI at a time when it would be
17 within the time frame where they would not be issuing the order.

18 THE COURT: There is no way you are going to get a
19 ruling on a PI and an opinion on the PI within ten days. It is
20 not possible. It is not possible. So what's going to happen in
21 ten days?

22 MR. KIM: Well, if they issue the order, your Honor, my
23 client's business will be destroyed.

24 THE COURT: All right.

25 MR. KIM: And if they issue the order, they will likely

1 take the position that your Honor will not be able to pass on
2 the merits of this dispute.

3 THE COURT: Well, but what's the reason to believe it
4 will be destroyed?

5 MR. KIM: Your Honor --

6 THE COURT: Why can't it be resuscitated if it turns
7 out that it's an illegal order later?

8 MR. KIM: Because, your Honor, by the time that --
9 well, first of all, the issuance of the order itself is a
10 legally significant event for a company such as Solengo.

11 THE COURT: Why?

12 MR. KIM: Because, your Honor, as Mr. Hunter's
13 declaration explains, there are various permits and licenses
14 that they must secure, and the issuance of an enforcement action
15 against the --

16 THE COURT: You don't know if you are going to get
17 those permits and certificates. You are standing there right
18 now without any knowledge whether those will ever be granted.

19 MR. KIM: Your Honor, I believe the statements in the
20 factual record, which are the only factual material before your
21 Honor, because none of the lawyers here have any personal
22 knowledge, obviously, and I am not appearing before your Honor
23 as a fact witness -- but a fact witness has submitted a
24 declaration to your Honor, which is Brian Hunter. And what
25 his --

1 THE COURT: But he doesn't know for sure whether he
2 will ever get those permits.

3 MR. KIM: Your Honor, I think --

4 THE COURT: How does he know? He doesn't have a
5 crystal ball.

6 MR. KIM: What we do know, your Honor, and I believe
7 this really goes to the heart of the issue, is that if there is
8 an enforcement action against the principal of Solengo, the
9 majority owner and the person who is supposed to do the trading,
10 then he will never get those permits. And I believe that's the
11 critical fact, your Honor.

12 THE COURT: How does he know that?

13 MR. KIM: That's -- well, he has been advised, your
14 Honor. And I think the important thing is --

15 THE COURT: Advised by who?

16 MR. KIM: Well --

17 THE COURT: I don't have it in front of me. I don't
18 have the declaration.

19 MR. KIM: Yes, your Honor.

20 THE COURT: You tell me.

21 MR. KIM: Yes, your Honor.

22 THE COURT: Who is advising him?

23 MR. KIM: The professionals who are handling these
24 permits and licenses --

25 THE COURT: Do they have crystal balls?

1 MR. KIM: No, your Honor. And I believe that the
2 standard that we are supposed to meet in terms of proving
3 irreparable injury is not a 100 percent certainty as to what
4 would happen in the future, but I think the concept is that if
5 what they are purporting to do is allowed to happen and it turns
6 out that we were right, I think what we are entitled to prove is
7 that based on the evidence before the Court -- the only factual
8 record is Mr. Hunter's statements. They have not put in any
9 evidence that suggests that the license would be granted or that
10 the relief of Mr. Hunter is unreasonable in some way.

11 Obviously, nobody has a crystal ball, your Honor. It's
12 the very nature of provisional relief that we are asking for
13 something that would happen in the future --

14 THE COURT: You came before this Court wanting to
15 proceed ex parte.

16 MR. KIM: Yes, your Honor.

17 THE COURT: This Court refused that request.

18 MR. KIM: Yes, your Honor.

19 THE COURT: You wanted me to rule in your favor without
20 the Government even having a chance to be heard.

21 MR. KIM: Actually, your Honor --

22 THE COURT: Now, you are willing to have the Government
23 be heard, but you are not giving the Government any opportunity
24 to set forth in writing even -- we haven't even had enough time
25 for that -- as to why it believes your position is totally not

1 supportable by law.

2 So, I mean, you are the ones trying to rush this Court
3 into a ruling in your favor before the agency even makes a
4 decision. The agency hasn't made a decision yet. You are
5 expecting a decision will occur. Maybe the decision won't
6 occur; maybe it will occur. We don't know.

7 MR. KIM: Your Honor, we have been informed that the
8 Commission has actually voted in favor of this, and it's just a
9 formal issuance of the order that has not happened yet. So the
10 agency has made a decision, and there is a certainty of harm at
11 a date certain in the future.

12 Yesterday, if I were to come before your Honor -- the
13 reason we applied ex parte is -- obviously, the history of our
14 dialogue with the FERC has not been -- has not led to amicable
15 resolution of these issues. That's why we are here taking
16 care -- taking your Honor's time.

17 Now, the fact is we were concerned that if the FERC
18 issued the order in response to our invitation to them to come
19 before your Honor, that would be the very harm, and there is
20 nothing anybody could do about the consequences that flow from
21 it.

22 What I was going to ask your Honor yesterday was not to
23 issue the relief permanently, but rather -- or even ten days,
24 but to ask your Honor to enjoin the FERC from issuing it the
25 very next day, which is what their letter had stated they would

1 do, and to ask the FERC to come here for argument. I wasn't
2 suggesting, and I still -- obviously, I believe it's
3 unreasonable to ask the Court to issue the actual relief
4 requested without giving the other side an opportunity to
5 respond. And, your Honor, coming before you today --

6 THE COURT: You are the one who wanted an ex parte
7 TRO --

8 MR. KIM: Yes, your Honor, but --

9 THE COURT: Not me.

10 MR. KIM: Yes. The ex parte conference that we
11 requested, your Honor, would have been to have an order issued
12 to prevent the FERC from issuing its enforcement order.

13 THE COURT: That's a TRO.

14 MR. KIM: Yes, your Honor. But the very fact is that
15 if the FERC issues this enforcement order -- this is a unique
16 situation where the very harm we are seeking to prevent would
17 have happened instantly. It's different, for example, where the
18 harm we're requesting your Honor stop takes some time or that we
19 would have notice that it's taking place at the time, such as
20 somebody coming and literally destroying our business physically
21 or some act of that sort.

22 This would be something that the FERC could just do at
23 the stroke of a pen, since the Commission has apparently already
24 voted to do this, which is what we have been informed. And if
25 it had happened, two consequences would have flown from it.

1 First of all, Solengo itself -- the very harm we are
2 trying to prevent -- would have been destroyed, and secondly,
3 they would be sitting here arguing your Honor doesn't have
4 jurisdiction because they have already issued the order. And
5 there is really nothing more in dispute. And what we were --
6 simply what we are trying to do is to get them here, your Honor.

7 And today what I am asking, your Honor -- I believe
8 that, you know, we have had a lot of law we have put before your
9 Honor. I believe there is more work I can do. These are
10 difficult questions of law that -- I say difficult in the sense
11 that it requires the study of various materials.

12 I am asking your Honor to prevent the FERC from issuing
13 the order until the parties have had a chance to fully brief
14 your Honor and your Honor can decide this case on the merits.

15 There is -- your Honor is correct to point out that
16 nobody has a crystal ball, nobody knows what definitely will
17 happen in the future, but that is true in every case of
18 provisional relief. What is true here, your Honor, is that the
19 factual statements put before you by the principal of the
20 company, by the very person actually whose interests would be
21 harmed, provides --

22 THE COURT: I thought this company couldn't get up and
23 running until it gets these permits; isn't that right?

24 MR. KIM: Well, if the permits of the prime brokerage
25 relationships, et cetera, are prevented from materializing, it

1 could not actually trade. In other words, it could not actually
2 function as a commodities broker or as a trading vehicle.

3 THE COURT: Yes, but whether or not the permits issue
4 is not a decision that FERC makes, right?

5 MR. KIM: But the FERC's decision to start an illegal
6 enforcement action would prevent those events from occurring.
7 It would stop Solengo from being able to launch in the first
8 place and would effectively destroy Solengo because all the
9 investors that have indicated interest and the employees would
10 disappear.

11 THE COURT: How many investors?

12 MR. KIM: I don't know the exact number, your Honor.

13 THE COURT: Give me a rough idea. 20? 100?

14 MR. KIM: I believe that there are --

15 THE COURT: A thousand?

16 MR. KIM: I believe that there are indications of
17 interest from numerous investors representing large amounts of
18 money.

19 THE COURT: Time out.

20 MR. KIM: Yes, your Honor.

21 THE COURT: Indication of interest is valueless. I
22 want to know who has put money down. How many?

23 MR. KIM: Your Honor, nobody can actually put money
24 down right now because of SEC regulations that require a certain
25 waiting period before investors can consummate their investment

1 interest.

2 THE COURT: So other than your client, no one has put
3 money down?

4 MR. KIM: Well, if by putting money down, your Honor
5 means that there is an actual investor who has --

6 THE COURT: Who has committed.

7 MR. KIM: -- consummated -- well, your Honor --

8 THE COURT: Who has committed.

9 MR. KIM: I believe by definition this vehicle has
10 not -- does not have an investor who has put money down in that
11 sense.

12 THE COURT: So basically, at this point, your client
13 has no investors who have committed any money to his custody and
14 control yet?

15 MR. KIM: Well, I believe in a lay sense and not sort
16 of strictly as a contractual sense it is accurate to say that
17 people have committed money because I think the very nature of
18 this type of industry is that the process for getting money from
19 investors is that investors basically indicate an interest to
20 invest and then, when various intermediate steps are completed,
21 they consummate that indication of interest by an actual
22 investment. But, your Honor --

23 THE COURT: If the business starts now or starts next
24 month, starts the month after, what's the harm to your client?
25 The business hasn't even started yet. The company hasn't even

1 come into existence yet.

2 MR. KIM: Well, the company does exist, your Honor, and
3 Mr. Hunter has spent a substantial amount of money gathering not
4 just the indications of interest from investors, but also a
5 trading team of people who will leave if Mr. Hunter has an
6 enforcement action against him and is unable to operate and is
7 unable to actually launch Solengo.

8 THE COURT: Is he paying salaries of those people on
9 the trading team?

10 MR. KIM: Yes, your Honor.

11 THE COURT: Okay. When did he start paying salaries?

12 MR. KIM: I don't know the precise date, but it has
13 been several months.

14 THE COURT: Several months?

15 MR. KIM: Yes.

16 THE COURT: Okay. Has he rented space?

17 MR. KIM: Yes, your Honor.

18 THE COURT: He has. And where is that located?

19 MR. KIM: In Canada, as well as I believe several other
20 places.

21 THE COURT: In Canada?

22 MR. KIM: Yes, your Honor. Mr. Hunter is Canadian.

23 THE COURT: He is Canadian?

24 MR. KIM: Yes, your Honor. He resides in Alberta,
25 Canada. So Solengo is an operating company. It has employees.

1 It has a substantial amount of --

2 THE COURT: In the United States?

3 MR. KIM: I believe they --

4 THE COURT: Anywhere in the United States?

5 MR. KIM: I believe there is a New York and Connecticut
6 offices that either exist or are in the stage of actually being
7 put together. And a lot of money has been spent on that
8 already, I believe.

9 So -- and, your Honor, I think the fact is that when
10 you look at the other side of the equation, the potential harm
11 to the FERC from just having FERC enjoined from issuing this
12 order at least until your Honor can get adequate briefing and
13 decide this legal issue -- I would submit that there is no
14 legally recognizable harm.

15 The subject of the purported enforcement action is
16 purely past conduct. It's conduct that is from 2006. So we are
17 not talking about some ongoing activity by Mr. Hunter that FERC
18 is trying to stop or affect legally in some way.

19 All of the evidence involved has already been gathered
20 by the FERC, and supposedly the -- at least according to the
21 FERC, the Commission has already voted to initiate an
22 enforcement action. So, your Honor, I believe -- if we are
23 talking about giving the Court an adequate amount of time for
24 both parties to fully brief the Court, which is the only issue
25 before your Honor today because, obviously, we are not asking

1 investment company such as this and start trading the next day.
2 You have to -- he has spent a substantial amount of money
3 putting together a proprietary trading system that is unique,
4 that exists nowhere else. And the people who can put those
5 trading systems together -- and this is part of this declaration
6 as well -- will no longer work with him, obviously, if there's
7 an enforcement order against the actual principal.

8 So, your Honor, I believe that -- I take your Honor's
9 point that I cannot sit here and say I know with 100 percent
10 certainty that X number of dollars will come into the fund, or I
11 know with 100 percent certainty that the fund will be X as of a
12 certain point. But what I do believe, your Honor, is that the
13 record of irreparable injury is there because if it turns out
14 that we are right, all of these things are not quantifiable in
15 terms of money. Mr. Hunter will have no, relief your Honor.

16 THE COURT: Mr. Hunter -- if Mr. Hunter opens a
17 business and starts trading in the market, he may lose in every
18 single trade he makes.

19 MR. KIM: Yes, your Honor, or he --

20 THE COURT: You don't know if he will win or lose on
21 every trade he makes. No one knows. It may be, if he started
22 his business next week, he would have six straight weeks of
23 losses, and at the end of six weeks he would be bankrupt.

24 MR. KIM: Yes, your Honor.

25 THE COURT: We don't know that. It's all very -- it's

1 all speculative.

2 MR. KIM: Your Honor, and I believe that amount of
3 uncertainty about the future is not inconsistent with
4 provisional relief because certainly if --

5 THE COURT: Have you got a case in our District that
6 says that? Have you got a Circuit -- in this Circuit, have you
7 got a case that says that?

8 MR. KIM: Well, certainly, your Honor, the concept that
9 harm to trading operations is economic harm is litigated every
10 day in the courts of New York and other financial centers.
11 Certainly -- obviously, for example, in any sort of fund or
12 investment company --

13 THE COURT: Have you ever seen a case in this Circuit
14 where a District Judge issued a Preliminary Injunction or TRO to
15 prohibit a Government agency from initiating an enforcement
16 action on the theory that doing so would harm a Plaintiff's
17 ability to make money in a business that didn't exist yet?

18 MR. KIM: Your Honor, the business does exist.

19 THE COURT: Well, I be -- I don't want to quibble with
20 you. That isn't up and running yet.

21 MR. KIM: Well, the business -- there are various
22 aspects to an investment company such as this. Obviously, the
23 trading operations is the ultimate goal.

24 THE COURT: Right.

25 MR. KIM: But it's not that there is a -- the traders

1 just walk into a room and just start trading.

2 THE COURT: So -- let's not quibble. Have you ever
3 seen such a case? Does it exist?

4 MR. KIM: Your Honor, I believe that the -- first of
5 all, in answer to your Honor's precise question, I am not aware
6 of a D.C. Circuit case with that fact pattern. However --

7 THE COURT: Let's go to the Second Circuit. That's
8 where you practice law.

9 MR. KIM: Yes, your Honor.

10 THE COURT: Have you ever seen a Southern District of
11 New York case where a District Judge there issued a PI to
12 prohibit a Government agency from launching an enforcement
13 action in order to provide the kind of relief you are seeking on
14 behalf of a company that wasn't trading yet but was hoping to be
15 trading in the near future?

16 MR. KIM: Your Honor, I am not aware such a case, but
17 only because I believe the SEC's ability to regulate the
18 securities markets is unquestioned, and I don't think anybody
19 would seriously question the SEC's ability to do that.

20 I believe this is really the first time that I am aware
21 of where an agency that regulates the physical markets, such as
22 the Federal Energy Regulatory Commission, is arguing that it can
23 now regulate an area that Congress has clearly delineated to the
24 CFTC.

25 Now, your Honor, I would, in response to the essence of

1 your Honor's question, I would point your Honor to various cases
2 in our brief as well as other cases I believe, with an
3 opportunity, I would be to submit to your Honor that does hold
4 that Courts, when examining an agency that is acting ultra vires
5 and outside of its jurisdiction, whether the harm that they are
6 about to commit is economic or otherwise, the Courts do have the
7 power to issue an injunction, to exercise its equitable power.

8 And I believe it's only logical that if the Court -- if
9 an Article III judge has that power, within the realm of his
10 discretion, he can choose to exercise that power in the context
11 of a preliminary proceeding or a permanent proceeding.

12 THE COURT: Did you read my opinion in Brendsel versus
13 OFHEO?

14 MR. KIM: I am not familiar with that opinion, your
15 Honor.

16 THE COURT: You ought to check it out.

17 MR. KIM: Yes, your Honor.

18 THE COURT: I will hear from the Government.

19 MS. ROSE: Good afternoon, your Honor.

20 THE COURT: Good afternoon.

MS. ROSE: The instant Motion should be denied quite simply because Mr. Hunter cannot meet the criteria necessary for the extraordinary relief of the issuance of an injunction. Your Honor hit the nail on the head. The key here is that this is, in fact, extraordinary relief to ask that a regulatory agency be

1 enjoined from performing their inherent function.

2 And the key here is that this -- when we keep referring
3 to the order at issue, it is simply a preliminary order. It is
4 an order to show cause. Once that issues, Mr. Hunter will have
5 all of the rights that attach with that, and it will proceed
6 through the administrative process, as cases normally would. So
7 he is not being denied any rights with the issuance of the order
8 at issue.

9 THE COURT: He indicated that his sources tell him that
10 the board at FERC has already voted on this, the issuance of
11 this order to show cause. Is that consistent with your
12 understanding as well, or is your understanding different from
13 that?

14 MS. ROSE: I am not certain what the board has and has
15 not done, but I do believe that they do intend to issue the
16 order to show cause.

17 THE COURT: You can just check with your client. That
18 will be fine. We try to keep it to one speaker at a time.

19 (Pause.)

20 THE COURT: Ms. Rose.

21 MS. ROSE: Your Honor, I apologize for that
22 interruption. I do believe that the letter issues prior to the
23 order, so that the order will, in fact, issue.

24 But that aspect of it goes to the first criteria for
25 injunctive relief, which is a strong likelihood of prevailing on

1 the merits and simply, you know, having an order to show cause
2 doesn't -- there is no likelihood of prevailing on the merits
3 here. And also it's notable that 7 USC Section 2(a)(1)(A) --
4 Mr. Hunter failed to continue his excerpt from the necessary
5 statute. And under that statute, FERC does, in fact, have the
6 authority to issue such an order.

7 And also, along with that, as far -- I will be brief,
8 your Honor. As far as the irreparable harm goes, I have been
9 told that the CFTC, which is the other agency that I believe
10 Mr. Hunter is arguing that they have exclusive jurisdiction -- I
11 have been informed and actually given authority to represent to
12 you today that they will be filing in the Southern District of
13 New York tomorrow morning their investigation of Mr. Hunter.

14 So there really is no irreparable harm to our order
15 possibly issuing on Thursday, considering that, you know, there
16 is already this information out there. This --

17 THE COURT: So he is facing, apparently, multi-front
18 investigations or whatever from various U.S. Government agencies
19 in the near future?

20 MS. ROSE: Yes, your Honor. And also -- it's also
21 worth noting that the instant Motion and Complaint were, in
22 fact, publicly filed, and so this information is already
23 publicly -- it's available. It's out there now. And there have
24 been numerous Wall Street Journal articles written on Mr. Hunter
25 and on this -- the matter at issue here.

1 So as far as keeping any of this quiet on the order to
2 show cause, there just simply is no irreparable harm here.

3 THE COURT: Yes. So if the Court were to deny the TRO,
4 when would the Government be in a position to file its brief in
5 opposition to the memorandum that's been filed already in this
6 particular Motion?

7 MS. ROSE: I have been told that we would be able to
8 oppose -- to file papers in this case as early as tomorrow.
9 The -- however, you know, the agency feels that they should be
10 able to proceed as they normally would with their regulatory
11 functions and not have to wait for briefing on any injunctive
12 relief that Mr. Hunter may seek here.

13 THE COURT: All right.

14 MS. ROSE: I would also point out that, as your Honor
15 stated a few moments ago, that if, in fact, this order to show
16 cause were found to be somehow illegal at any point in the
17 future, that, as you pointed out, Mr. Hunter would be entitled
18 to any damages at that time. So that, again, cuts against any
19 injunctive relief here.

20 THE COURT: It's not even really -- it's not really a
21 final order by the agency. It's basically -- it's the
22 initiation of an investigation that's accompanied by a demand
23 that he show cause why they shouldn't do something in the
24 future.

25 MS. ROSE: Yes, your Honor. In fact, it is just that.

1 Then he is given his opportunity to be heard and all of, you
2 know, the administrative rights that go along with those
3 procedures which I am not personally familiar with at this time,
4 but --

5 THE COURT: All right. Very good. Thank you,
6 Ms. Rose.

7 MS. ROSE: Thank you, your Honor.

8 MR. KIM: Your Honor, may I be heard?

9 THE COURT: Sure. Are you going to file a TRO up in
10 the Southern District of New York to stop the CFTC from filing
11 their --

12 MR. KIM: Your Honor, that was going to be one of the
13 points that I --

14 THE COURT: -- order to show cause?

15 MR. KIM: I am not suggesting that Ms. Watson [sic] is
16 deliberately misrepresenting anything to your Honor. I believe
17 she is obviously stating her understanding of what others might
18 have told her. But I believe a number of factual statements she
19 made to you are absolutely incorrect.

20 First of all, this notion that the CFTC, quote/unquote,
21 is going to file some type of -- I think she said they are going
22 to file their investigation in the Southern District of New
23 York. The CFTC, your Honor, has a process called the Wells
24 process where, if they are contemplating filing an enforcement
25 action against a person, they notify that person and then take

1 submissions from them. That has not happened with Mr. Hunter.
2 We have had no indication from the CFTC whatsoever that they are
3 going to file any action -- any enforcement action against
4 Mr. Hunter.

5 In addition, your Honor, I believe others on the -- in
6 this group of lawyers I told you spoke with the CFTC and the
7 CFTC indicated that they may have an interest in basically
8 appearing in this action or otherwise getting involved in some
9 way -- and I don't know the exact words spoken, but in terms of
10 indicating that the FERC should not proceed, and in addition,
11 your Honor, recently there were Senate hearings not on whether
12 laws were violated, but essentially on the regulation of markets
13 where the CFTC testified and indicated that it had conducted an
14 expert study of Amaranth, Mr. Hunter's prior employer's
15 trading -- the trading that Mr. Hunter had done in 2006, and had
16 not found any of the types of violations that were being
17 discussed at the Senate.

18 So the notion that they are going to file,
19 quote/unquote, some investigation, I believe that sentence
20 itself makes no sense. I believe it's something that is, I
21 believe, just completely incorrect.

22 If whatever they are referring to happens, then
23 obviously that can be a relevant consideration for your Honor.
24 But it is absolutely incorrect, I believe, to suggest that
25 Mr. Hunter is facing any other regulatory action. If so, then

1 the CFTC will have completely violated its own procedures, and I

2 don't believe there is any basis to think they have done that.

3 Second, your Honor, they have indicated that they have

4 the authority -- they have just asserted in a conclusory manner

5 that they have the authority to issue this order and that we

6 have to wait until the order is final and so forth.

7 Your Honor, the cases that we have cited -- and I

8 believe there are others -- clearly indicate that those types of

9 concepts, Administrative Procedure Act finality concepts,

10 exhaustion concepts do not apply where the agency is acting

11 wholly outside of its statutory authority because the very act

12 of issuing the order or initiating the proceeding is something

13 that this Court can review as a matter of law before they are

14 allowed to do it.

15 And, further, your Honor, I believe Ms. Watson referred

16 to a Motion and Complaint that was apparently publicly filed. I

17 am not sure what she is --

18 THE COURT: Her name is Rose.

19 MR. KIM: I'm sorry.

20 THE COURT: Megan Rose.

21 MR. KIM: Yes, your Honor. I believe that -- I thought

22 I heard Ms. Watson out in the hallway.

23 But what Ms. Rose is referring to -- your Honor, couple

24 of points about that. First of all, we are not here to ask your

25 Honor for an injunction to stop the Federal Energy Regulatory

1 Commission from telling people that it intends to issue the
2 order. So this is not an action to keep them quiet. This is an
3 action to stop the issuance of the order itself. So --

4 THE COURT: It's an order to show cause.

5 MR. KIM: Your Honor --

6 THE COURT: That's all it is. They are ordering your
7 client to show cause.

8 MR. KIM: Your Honor, I believe the way that the
9 communication from FERC to us was described is inaccurate. I
10 think Ms. Rose described it as an order initiating an
11 investigation. Your Honor, that is not the order we are
12 complaining about. There is an order initiating an
13 investigation, but this is a totally different order altogether.

14 And I believe part of the confusion is arising from the
15 fact that -- that the FERC has basically voted to start an
16 enforcement action. The order to show cause they are referring
17 to is their complaint in the process that they have set up, your
18 Honor.

19 THE COURT: I have heard enough. I am going to deny
20 the TRO. The agency has until Monday, the 30th, to file its
21 brief opposing the memorandum of law in support of the TRO, PI.
22 You have until Friday the 3rd to file any reply that you are
23 going to file. We will set a hearing for the afternoon of
24 August 7th at 3:00 for oral arguments on the PI. And that's the
25 Court's ruling.

1 See you on the 7th, Counsel.

2

3 (Whereupon, at 4:59 p.m., the proceedings were

4 concluded.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF REPORTER

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I, Patty A. Gels, certify that the foregoing is a
correct transcript from the record of proceedings in the
above-entitled matter.